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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 312

HARRY R. SWANSON, AS SECRETARY OF THE STATE OF NEBRASKA, ET AL.,

Appellants,

vs.

GENE BUCK, INDIVIDUALLY AND AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' "SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI"

WALTER R. JOHNSON,
Attorney General of Nebraska
JOHN L. RIDDELL,
Assistant to the Attorney General
WILLIAM J. HOTZ,
Special Assistant to the Attorney General, Omaha, Nebraska

Counsel for Appellants.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The appellants' opposition to the granting of appellees' motion of January 11, 1941, to enlarge the record on this appeal is based upon two principal grounds:

I. THE RECORD FOR APPEAL NOW ON FILE IN THIS COURT (TRIED BELOW IN EQUITY WITHOUT A JURY) WAS FIRST SETTLED BY THE THREE-JUDGE FEDERAL COURT AFTER A FULL AND COMPLETE HEARING THEREON, AND A FINAL ORDER OF SETTLEMENT OF THE RECORD WAS ENTERED BELOW ON OCTOBER 12, 1940. A CERTIFIED COPY OF THAT FINAL ORDER WAS FILED WITH THE CLERK OF THE SUPREME COURT ABOUT THE 12TH DAY OF NOVEMBER, 1940.

II. THE APPELLEES HAVE SET FORTH IN THEIR MOTION NO GOOD REASONS FOR ENLARGING THE THREE VOLUME RECORD ON APPEAL HERETOFORE FILED BY APPELLANTS.

THEREFORE THE APPELLEES' MOTION OF JANUARY 11, 1941 SHOULD BE DENIED.

We call the Court's attention to the following facts:

Comments Upon Point No. I

1. The transcript of record on appeal, as prepared by the appellants, consists of three volumes. These were filed with the Clerk of the Supreme Court on August 6, 1940. Each volume contains an index of its contents. Volume I contains all pleadings and decisions of the lower court and all the appeal papers with proof of service thereof; Volume II, properly indexed, contains a condensed statement in narrative form of all the evidence of all the witnesses given at the trial, in the depositions, and in the interrogatories; Volume III, properly indexed, contains all the exhibits, many in complete and others in condensed form to avoid duplication and for simplification of the record on appeal.

2. The order below allowing the appeal was signed June 27, 1940. (R. Vol. I, p. 72).

3. On June 28, 1940, there was personally served upon the appellees, through their counsel of record, certified copies of the following papers:

(a) Citation
(b) Petition for Appeal
(c) Order Allowing Appeal
(d) Cost Bond and Order Fixing Amount Thereof
(e) Assignment of Errors, with Brief and Law Points Relied upon for Reversal
(f) Jurisdictional Statement of Fact, with Citations to Statutory Reference of Jurisdiction, together with Opinions and All Rulings of the Court from which the Appeal Was Taken, and
(g) Direction to the Appellees Calling Their Attention to Sub-section 3 of Rule 12 of the Supreme Court of the United States.

The affidavit of service of the above papers was filed with the Clerk of the United States District Court on July 1, 1940 (R. Vol. I, pp. 161-2).

4. On July 27, 1940, which was thirty days after the appeal had been allowed and the citation issued and service made on the appellees, the appellants filed their praecipe for designation of record on appeal with the Clerk of the United States District Court (R. Vol. I, p. 181) and served the same upon the appellees on July 27, 1940. Affidavit showing that service is of record (R. Vol. I, p. 184). Appended to that praecipe, and showing in the service and return thereof, were the entire three volumes of the transcript of the record on appeal subsequently filed in the Supreme Court of the United States on August 6, 1940 (R. Vol. I, pp. 184-5).

5. Thus, within the forty days provided by the rules of the court, the record on appeal as designated by the appellants, in each and all particulars, together with all the appeal papers, were served upon the appellees in the exact form they now appear in the office of the Clerk of the Supreme Court.

6. Because this three volume record on appeal was compiled in condensed and abbreviated form, in accordance with Rule 75 (e) and Rules 10 and 12 of the Supreme Court of the United States, there was included with said papers when served upon the appellees, assignments of error *and* the law points relied upon for reversal in combined form, though each separately set forth (R. Vol. I, pp. 77-84; 85-91). Service of all these papers and the entire three volume record was made upon the appellees on July 27, 1940 (R. Vol. I, pp. 184-5).

7. However, before the appellants had an opportunity to complete their designation of record, the appellees filed a counter-designation even before they had seen the appellants' designation. This unwarranted appellees' counter-designation was dated July 26, 1940.

8. Thereafter and when the appellants' designation of record was served upon the appellees on July 27, 1940, the appellees filed (about the same as the previous one) another counter-designation of record dated July 31, 1940; and then on September 21, 1940, appellees filed still another counter-designation in substance the same as the other two. (These are now of record with the Clerk of the United States Supreme Court).

9. On the 8th day of October, 1940, the appellants filed a resistance to these counter-designations setting forth the lack of necessity in printing in substance the entire record which appellees were demanding in their counter-designations. (Appellees are now demanding the same things by their motion of January 11, 1941, to which this opposition is directed.)

10. On the 31st day of July, 1940, the appellees filed in the lower court a motion, the prayer of which was as follows:

> "WHEREFORE, plaintiffs-appellees move the Court that a time and place be fixed by this Court to settle the differences as to the said record, proceedings and evidence heard in said cause in the District Court, and the record made to conform to the truth. Said hearing shall be before this Court and at such time and place as the Court may direct, and the Clerk shall give notice thereof to all the parties."

This matter was then fully heard in the lower court on October 12, 1940.

11. However, on August 2, 1940, the Clerk of the United States District Court mailed to the Clerk of the Supreme Court of the United States all the above papers covering the matters thus put in issue for the settlement of the record below at the proposed hearing.

12. There was lodged with the Clerk of the Supreme Court these counter-designations of the appellees, their own motion directed to the lower court to settle the record, and the resistance thereto filed by the appellants asking either the Supreme Court or the lower court to deny the counter-designations for reasons set forth in the appellant's opposition. Therefore, the issues now before this Court were fully presented to the lower court and finally ruled upon, because the Clerk of the United States Supreme Court suggested that the differences in connection with the record be settled by the lower court. [Code Civ. Proc. 75 (h)].

13. Accordingly, a formal hearing on the settlement of the record was thus had before the Honorable Archibald K. Gardner, Circuit Judge, Honorable Thomas C. Munger and Honorable James A. Donohoe, District Judges, on October 12, 1940. The following order was then entered by that lower court:

"This cause having come on for hearing this 12th day of October, 1940 on the objections of the appellees to the proposed designation by appellants of portions of the record on appeal, and on appellees proposed designation of additional portions of the record on appeal, and upon the objections of appellants to such proposed additional portions of the record, and the court having heard the arguments of counsel for the respective parties, and being duly advised in the premises,

"IT IS ORDERED, that appellees said objections be overruled and that appellants objections to the appellees designation of proposed additional portions of the record be sustained.

ARCHIBALD K. GARDNER,
U. S. Circuit Judge
THOS. C. MUNGER,
U. S. District Judge
J. A. DONOHOE,
U. S. District Judge

14. As above stated, a certified copy of this final order settling the record was lodged with the Clerk of the Supreme Court of the United States about the 12th day of November, 1940.

15. Rule 75 (h) of Civil Procedure, which by reference is made a part of Supreme Court Rule 10 (2), recites:

"Power of Court to Correct Record. . . . but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

16. The appellees had requested by motion above referred to that the record be settled and adjusted and the differences presented to the lower court; an order for hearing was so entered and the hearing was held, as above stated, and resulted in the

foregoing final order of the three-judge federal court on October 12, 1940. This order was lodged with the Clerk of the Supreme Court.

17. It will also be observed that the lower three-judge federal court, which had heard the case on the merits, sitting in equity and without a jury, had before it the entire original record in the case, with all the exhibits and all the testimony, depositions, interrogatories, and pages upon pages and box upon box of exhibits. These the Court compared with the three volume transcript of the record (now lodged with the Clerk of the Supreme Court) theretofore prepared and filed by the appellants, and which had been served upon the appellees long previous to this hearing (R. Vol. I, p. 184). The records show that the attorneys for the appellees appeared to argue their cause and to urge the inclusion in the final record on appeal all the matters contained in their counter-designations. The attorneys for the appellants were likewise in court to present their opposition on file. There was before the lower court the assignment of errors and the law points relied upon for reversal, all of which, as above stated, had been served upon the appellees within the times provided by the rules. All the matters now before the Supreme Court were argued and the same objections to the record, as will be readily seen, that are now substantially if not exactly contained in appellees' "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" filed on January 11, 1941, were all before the lower court in the three counter-designations filed by the appellees and the resistance filed by the appellants. These papers are all certified and are of record with the Clerk of the Supreme Court of the United States, as above stated.

Conclusion on Point No. I

THEREFORE, the appellants pray that the appellees "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" dated January 11, 1941, be denied because the sub-

ject matter thereof was adjudicated properly in the lower court on October 12, 1940.

Comments Upon Point No. II

1. There are court rules, and decisions of the courts construing them, applicable to the present situation, and upon which this Court, in the interest of justice, may deny the appellees' motion now made in the Supreme Court of the United States.

2. Appellees' printed "Suggestion of Diminution of the Record and Motion for Writ of Certiorari" dated January 11, 1941, contains at the outset items 1 to 13, which the appellees now wish to have printed as part of the record on appeal. This is all the testimony in question and answer form of all the witnesses given at the trial and by depositions. The testimony and evidence in that form was denied by the lower court and should be denied by this court because no assignment of error nor law point relied upon for reversal raised any objection to the admission or the rejection of any part of said evidence by either side. No ruling of the lower court is challenged on this appeal on the admission or rejection of any of the evidence, either at the trial or in the depositions. Furthermore, the appellees have failed and now fail to point out wherein the condensed testimony in narrative form, prepared by appellants and submitted to appellees, misstates or omits any of the evidence, or that it in any manner fails to conform to the truth of the record.

3. Furthermore, the lower court in its opinion, 33 Fed. Supp. 377, finds from such of the evidence as is set forth in the three volume record now before this court on appeal, obvious facts that are not in dispute and which are borne out by the appellees' bill of complaint and their exhibits as well as the oral testimony of their own witnesses.

4. This cause was one in equity and was tried without a jury. Appellees filed no cross appeal.

5. Items 14 to 27 of appellees' printed brief of January 11, 1940, request the Court to require the Clerk to have printed exhibits which contain the titles to virtually thousands of musical compositions of the different witnesses. These are not in dispute as to title, or numbers, or ownership. Nowhere have these numbers been challenged in the pleadings, or in the assignment of errors, or in the law points relied upon for reversal. For example, in the transcript of record Volume III, instead of setting forth verbatim thousands upon thousands of copies of the names of musical compositions of the many witnesses, the appellants, after indexing the place in the record where the exhibit was introduced, summarize such exhibit as follows (R. Vol. III, p. 47, Ex. 18):

> "PL. DEP. EX. 18 P. 337 (MEYER), R. Vol. II, p. 97: List of compositions by George W. Meyer, one of the appellees, showing about 450 musical compositions copyrighted by the witness from 1907 up to 1936, with some copyright renewals. The publishers vary, but consist largely of Leo Feist, Inc., J. H. Remick & Co., and other ASCAP publisher members, for the most part. Some of the compositions are: 'Cuddle Up,' 'Daisy Went and Told on Me,' 'Dance and Grow Thin,' 'Do the Black Bottom with Me,' 'Do It in the Dark,' 'Don't Be Bashful,' 'Every Night He Goes over the Top,' 'For Me and My Gal,' 'I Love to Do It,' 'I Wouldn't Fool a Little Girl Like You,' 'I'd Do It All Over Again,' 'It's an Old Spanish Custom in the Moonlight,' 'When the Old Oaken Bucket Was New.'"

6. Another example is the demand to print a list of some 185 compositions of Gene Buck Exhibit 1 (R. Vol. III, p. 29):

"PL. EX. 1 (O.R. 6) (R. Vol. II, 2): List of about 185 compositions of Gene Buck. Typical line:

Composition	Collaborators	Publisher	Copyright Date	Remarks
'Ain't It Funny What a Difference Just a Few Drinks Make?'	Jerome Kern	T. B. Harms	6-21-16	Ziegfeld Follies

These compositions date from 1912 to 1931."

7. The lower court held that items 1 to 27 need not be printed in full in question and answer form, nor the exhibits verbatim.

8. Items 28 to 53 in appellees' printed motion of January 11, 1941, refer to exhibits other than musical compositions which appellees want printed verbatim. These are largely the contracts that existed between music publishers, the composers, and ASCAP (R. Vol. III, pp. 2-7). Appellants have set forth verbatim all the typical contracts attached to the appellees' bill of complaint, and with all the others that were introduced at the trial, most of which were identical with those contract exhibits; where differing in any particular, the different or supplementing paragraphs are copied by appellants for the record on appeal. A typical example is Plaintiffs' Exhibit 21 A, B, C, D, and E — Bartlett (R. Vol. III, p. 48). Those contracts were dated in 1898, 1905, 1906, 1903, and 1919. Actually they have no bearing on the subject matter of this case and are not in dispute; but, in fairness to the appellees, the exhibits were summarized in all particulars. No good purpose could be served by printing these huge documents showing the terms of the contracts that existed between Victor Herbert and various music publishing houses, running back as far as 1898 and occupying many pages. No error is predicated concerning them.

9. The lower court ruled that items 28 to 53 need not be copied verbatim for the record on appeal and were proper as epitomized by appellants.

10. Items 54, 55, 56, and 57 are requests by the appellees to have printed in the record all the interrogatories, consisting of many dozens of questions, that were asked of the witnesses Walter Fischer, Saul Bornstein, Gene Buck, and Gustave Schirmer. Each one of these interrogatories contained great lists of musical compositions and other voluminous documents that were produced and not used by either side at the trial, though the interrogatories and exhibits were all introduced in evidence at the trial. Furthermore, all of the witnesses whose interrogatories were taken testified in person at the trial or by deposition; and the same matters that were covered by the interrogatories were in that manner recorded. Consequently, it would only be a repetition of the testimony of these witnesses if again printed with the voluminous catalogues of music and volumes of names contained in the exhibits. No error is predicated upon any matters excluded or included in the interrogatories or the exhibits attached to them. These exhibits are, however, each epitomized in the record.

11. The lower court held that these items 54 to 57 inclusive need not be printed verbatim, and were in proper form as summarized by appellants.

12. There is one statement made under the heading of "Reasons for This Motion" (Section d) in the printed motion of the appellees of January 11, 1941, which is to the effect that Assignment of Error No. VII raised the point that the state statute in question should have been upheld in view of the "fraud and unlawful practices" perpetrated by the appellees in Nebraska. If the record before the court fails to show "fraud and unlawful practices," it would seem that in such event the appellants would be confronted with the lack of proof and the appellees should

have no complaint. However, the lower court in its opinion, 33 Fed. Supp. 377, sets forth the facts based upon the articles of association and the contracts of record, all of which are set forth verbatim in the transcript of record on appeal. The "fraud and unlawful practices" consisted in the formation by ASCAP of a combination of composers and publishers transferring to it all the public performance rights of such members and granting the power and authority in ASCAP to fix prices and control licenses in restraint of trade and in violation of the terms of the statute. That is the "fraud and unlawful practice" before the United States Supreme Court. These facts are admitted by appellees in their bill of complaint and exhibits attached.

13. The lower court passed upon this point adversely to appellees and denied them the right to have the whole record in the lower court printed because of that assignment.

14. The appellees also claim in their printed motion of January 11, 1941, that Assignments of Errors IX and XI (R. Vol. I, pp. 81-3) raise questions of fact. There is no dispute about such facts. Appellants in their assignment of errors claim the Court should have found a few additional facts concerning which there was and is no dispute. For example, the amount of rent admittedly annually paid by ASCAP for its quarters in New York; the salary admittedly paid to its officers; the admitted contracts with the radio stations and the license fees charged, as shown by ASCAP's own exhibits; the number of infringement suits in the State of Nebraska by certified copies introduced in evidence from the record of the Clerks of the United States District Courts; the increase in the amount of fees for users of music shown by the ASCAP contracts of record; and the testimony undisputed of the disposition made of the income of ASCAP by its board of directors. These facts are all taken from the records and exhibits of ASCAP and concerning which there is no dispute. The record on appeal Vol. II and III adequately support the assignment of errors on ASCAP's own admissions.

15. In the appellees' printed motion of January 11, 1941 is Item No. 58 wherein the appellees ask that all the docket entries in the court below be printed in the record on appeal. That was also before the lower court, and it ruled against the appellees thereon. Such a list of docket entries can serve no good purpose. The index to Volumes I, II, and III of the record on appeal before this Court is a justification for denying appellees Item No. 58 because the index is complete in itself for all matters before this Court on appeal.

16. Items 59, 60, and 61 are the three appellees' counter-designations which they wish printed in the record on appeal. These papers together with the motion of the appellees to have the lower court settle the record and adjust the differences on the counter-designations, together with the appellants' resistance thereto filed on the 8th day of October, 1940, and the final order of the Court dated October 12, 1940, were all certified by the Clerk of the United States District Court and sent to the Clerk of the Supreme Court, where now lodged. These items have no place whatever in the printed record on appeal. These items properly are before the Court now in this matter as to whether or not the appellees' motion should be denied, but would have no place in a printed record on appeal. Furthermore, the counter-designations of appellees are in themselves voluminous and would serve no useful purpose in the printed record on appeal.

17. Items 62 and 63 for the same reason have no place in the printed record on appeal. These two items are requests of the appellees to the Clerk and the certificate of the Clerk dated December 16, 1940 and December 23, 1940, in which it is apparent that the appellees in defiance of the lower court's order of October 12, 1940, attempted to order the Clerk of the United States District Court to make up the record on appeal as directed in the counter-designations exactly contrary to the ruling of the Court, and then sought to direct the Clerk of the Supreme Court of the

United States to likewise print the material contained in these counter-designations.

Evidently the Clerk of the Supreme Court refused to do so without an order of this Court, and hence the "motion" and "writ" of January 11, 1941, asking for the certification of records from below which appellees took upon themselves to lodge in the Supreme Court and actually did so in contravention of the Order of October 12, 1940.

Conclusion as to Point No. II

The printed motion of appellees dated January 11, 1941, should be denied because no facts or reasons have been presented to this Court to sustain it, and no facts are set forth to prove that the three volume record on appeal contains misstatements, errors or untruths — some of which matters must be proved if appellees' motion is to be sustained [Rules Civ. Proc. 75 (h)].

LIST OF CASES TO SUPPORT APPELLANTS' CONTENTION THAT THE THREE VOLUME TRANSCRIPT OF RECORD FILED WITH THE SUPREME COURT OF THE UNITED STATES ON AUGUST 6, 1940, IS PROPER AS THE RECORD ON APPEAL IN THIS CAUSE.

Texts:

(1) Present Rules of the Supreme Court of the United States 28 U.S.C.A., Secs. 241 to 370; 1940 Pocket Part, pp. 63-69.

(2) Previous Rules of the Supreme Court of the United States (1925), 28 U.S.C.A., Secs. 241 to 370, Rules 7 and 9, ————, pages 389 and 393.

[There are no material changes in reference to the condensation of the record on appeal of the testimony and exhibits, from Equity Rule 75 (b) and the present Rules of Civil Procedure 75 (c), (e), and (h)].

(3) New Rules of Civil Procedure, Rules 75 and 76, Title 28, U.S.C.A., Secs. 721 to 723; 1940 Pocket Part, pages 393 and 399.

(4) *Jurisdiction of the Supreme Court of the United States*, Robertson & Kirkham, Sec. 375, pages 763 to 766.

Decisions:

(1) In *Newton* v. *Consolidated Gas Co. of New York*, 258 U.S. 165, 42 S.Ct. 264, the Court on page 266 of the Opinion states:

"Equity rules 75 and 76 (33 Sup. Ct. xl, xli) direct that records on appeal shall not set forth the evidence fully but in simple condensed form and require omission of nonessentials and mere formal parts of documents. Without apparent attempt to comply with these rules and with assent of appellee's counsel, appellants in No. 257 have filed a record of 21 volumes — 20,000 printed pages — made up largely of stenographic reports of preceedings before the master with hundreds of useless exhibts and many thousand pages of matter without present value. This is indefensible practice, which we shall hereafter feel at liberty to punish to the limit of our discretion — possiby by dismissal of the appeal. These rules were intended to protect the courts against useless, burdensome records and litigants from unnecessary costs and delay. Counsel ought to comply with them, and trial courts should enforce performance of this plain duty."

(2) In *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372, 48 S. Ct. 183, the Court at page 189 of the Opinion states:

"As the rule places the duty of condensing and narrating the evidence primarily on the appellant, and most of the proceedings since the appeal have been attributable to the failure to discharge that duty, the appellant should be required, as one of the terms of the remission, to pay into the Circuit Court of Appeals $5,000 for the benefit of the appellee, by way of reimbursing it for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of the evidence, and also to pay, as one of such terms, the costs in this court and those in the Circuit Court of Appeals up to the time our mandate reaches that court."

(3) In *Krauss Bros. Lumber Co.* v. *Mellon*, 276 U. S. 386, 48 S. Ct. 358, the Court at page 360 of the Opinion states:

"By this it is not meant that the evidence shall be set forth at length in the words of the witnesses, and of the writings and documents admitted, but only that the purport and substance of all of it be included. In setting it forth, regard should be had to the requirements of paragraph 2 of Rule 7 of the Rules prescribed by this court. 266 U. S. 653. *Lincoln* v. *Claflin*, 7 Wall. 132, 136, 19 L. Ed. 106; *Zellers' Lessee* v. *Eckert*, 4 How. 289, 297, 298, 11 L. Ed. 979."

(4) In *Ray* v. *United States*, 301 U. S. 158, 57 S. Ct. 700, the Court at page 704 of the Opinion states:

"Rule 8 of the rules of this court (28 U.S.C.A. following section 354), to which rule 9 refers, provides (rule 8, par. 2):

'Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may

require that parts of it be set forth otherwise.' See Equity Rule 75 (b), 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570, 28 U.S.C.A. following section 723."

"The ruling in the instant case that the trial judge could 'no longer act to put the evidence in narrative form' and that the appellate court had 'no power to order him to do so' is erroneous."

(5) In *Moss* v. *Gilchrist-Fordney Co.*, 24 F. (2d) 931, 5th Cir., the Court at page 932 of the Opinion states:

"There remains a feature of the appeal of which we feel constrained to take notice. The testimony taken before the master appears in the printed record as it fell from the lips of the witnesses, and not in condensed narrative form, as required by equity rule 75b. This rule is not to be evaded by agreement of counsel, or an order of the District Court permitting the bringing up of all the evidence in its original form, though the rule contemplates the inclusion in the transcript of some of the testimony in the form of question and answer, in a proper case. *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 48 S. Ct. 183, 72 L. Ed. ———, decided January 3, 1928. We have heretofore announced our views as to the necessity of observing the rule. *Roxana Pet. Co.* v. *Rush* (C. C. A.) 295 F. 844; *Buckeye Cotton Oil Co.* v. *Ragland* (C. C. A.) 11 F. (2d) 231. In the exercise of discretion, we have disregarded the violation of the rule in this case; but it should be understood that a violation may lead to a refusal to consider the evidence improperly brought up and a decision on the appeal consistent therewith.

"The judgment of the District Court was right. It is affirmed."

(6) In *Hughes* v. *Reed*, 46 F. (2d) 435, 10th Cir., the Court at page 438 of the Opinion states:

"The record is not in compliance with equity rule 75 (28 U. S. C. A. Sec. 723) which provides in part:

'The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, all parts not essential to the decision of the questions presented by the appeal being omitted and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.'

"The rule is applicable to 'the evidence,' and is not confined to 'the testimony of witnesses.' An effort has been made to avoid printing the testimony of witnesses in question and answer form, although parts of that are a mere combination of question and answer, rather than a narration. But no effort has been made to 'state in simple and condensed form' the 340 exhibits introduced. These exhibits occupy 479 pages of the printed record, of which 296 pages are in fine type. More than 200 pages are devoted to printing in full all reports of the national bank examiner from 1919 on, repeating in each case the printed instructions on the blank. Each report occupies 15 pages of fine print; perhaps one or two lines in each are material. The minutes of every directors' meeting since 1918 are printed in full, including resolutions authorizing small donations to the Red Cross, proxies for meetings of the Federal Reserve Bank, and other details of not possible relevance here. Deposit tickets, notes, and checks are printed in full. To require these hundreds of pages to be set and printed is a sheer waste of money; and the result is a record which this court could only master at the expense of other work of the circuit. It is a clear violation of a rule in force since 1913, and to which the courts have called attention repeatedly. If it were not for the fact that reversible error appears from a superficial examination, the appellant would be required to comply with the rules."

(7) In *Trust Co. of Florida v. Gault*, 69 F. (2d) 133, 5th Cir., the Court at page 135 of the Opinion states:

"The provision of that rule that, if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness, cannot be

extended to embrace all the testimony nor to justify inclusion of motions, arguments, and rulings and other occurrences which are not evidence at all. *Barber Asphalt Paving Co.* v. *Standard Co.*, 275 U. S. 373, 48 S. Ct. 183, 72 L. Ed. 318. The very purpose of the rule is to prevent these things being done and to save the appellate court from the labor of winnowing the evidence and the party losing the appeal from the needless costs. *Newton* v. *Consolidated Gas Co.* 258 U. S. at page 174, 42 S. Ct. 264, 66 L. Ed. 538."

(8) In *Ruth* v. *Climax Molybdenum Co.*, 93 F. (2d) 699, 10th Cir., the Court at page 701 of the Opinion states:

"Equity Rule 75, 28 U. S. C. A. following section 723, provides, in substance, that in the preparation of the record on appeal the evidence shall be stated in condensed and narrative form, and that all parts not essential to a decision of the questions presented shall be omitted. The rule is not confined to the testimony of witnesses. It applies to exhibits. *Hughes* v. *Reed*, 10 Cir., 46 F. 2d 435. It was violated in the preparation of the record in these cases. Much testimony which could readily have been condensed was set forth verbatim; numerous explanations and arguments of counsel were included; and no effort was made to condense the exhibits or to omit parts of them not essential to a decision of the questions presented."

(9) In *American Electrotype Co.* v. *Kerschbaum*, 105 F. (2d) 764, U.S.C.A. for D. C., 1939, the Court at page 765 of the Opinion states:

"At the present term of court we have been confronted with records running as high as a thousand pages, which might easily have been reduced to one-fourth that number if counsel had exhibited a proper regard for the interests of their clients and a desire to save the court from unnecessary consumption of time. We cannot too strongly admonish the members of the bar of their responsibility in this respect. The practice of dumping into the record unnecessary papers and cumulative evidence, besides the drain upon the court's

time, frequently results in making the cost of litigation prohibitive to the man of moderate means and creates a scandal in the administration of justice."

So totally lacking are the appellees in their knowledge of the record before the Court, and as settled by the lower court, they have designated their motion of January 11, 1941, as an "Appeal from the Supreme Court of the State of Nebraska." As a matter of fact, the record shows that the case is one that was tried in equity before a three-judge federal court under Section 266 of the Judicial Code, and is a direct appeal from that three-judge federal court to the Supreme Court of the United States (33 Fed. Supp. 377).

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska

William J. Hotz
Special Assistant to Attorney General of Nebraska

1530-5 City National Bank Building, Omaha, Nebraska.
Counsel for Appellants

Dated:
January 27, 1941.

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